UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

RANDY WILLIAMSON, On Behalf of Himself and All Others Similarly Situated, **Plaintiff,** **V.** **AMERIFLOW ENERGY SERVICES, LLC; RESCENT SERVICES, LLC; AND CRESCENT CONSULTING, LLC;** **Defendants.**	§ § § § § § § § § § § §	**CIVIL ACTION NO. 2:15-cv-00878-MCA-GF** **JURY TRIAL DEMANDED**

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM ROBERT WALKER SR.

Plaintiff Randy Williamson, individually and on behalf of all others similarly situated, files this Response to Defendants' Motion to Compel and Plaintiffs' Motion for Protective Order and respectfully state as follows. Defendants filed three separate Motions to Compel against Robert Walker, Glen Martin, and Randy Williams. *See* Dkts. 99, 100 and 101, respectively. Because Defendants chose to adopt their arguments from docket entry 99 into docket entries 100 and 101 and in order to save the Court's time and administrative costs, Plaintiffs will respond to the arguments in all three motions in this single brief. If the court prefers separate filings, Plaintiff will gladly accommodate.

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants' motion to compel seeks documents that do not exist or are not discoverable. Defendants move to compel: (1) Plaintiff's state and federal income tax returns; (2) Plaintiff's tax documents received from third parties; (3) Plaintiff's form 1099s and W-2 forms Plaintiff provided to others and Plaintiff's communications with those persons; (4) Plaintiff's "fundamental" documents related to his business(es); and (5) Plaintiff's invoices and related documents Plaintiff submitted to third parties.

Defendants' motion to compel tax returns and other tax documents conflates the cause of independent contractor misclassification with its effect. When a worker files a tax return noting a deduction for use of tools as the result of a company misclassifying him as a contractor, such tax filing is the consequence of the misclassification. Employers seeking to avoid overtime pay cannot then claim the filing of such tax returns is evidence of contractor status. Defendants' position, while clever, defies logic.

Defendant's motion is light on legal authority precisely because the overwhelming weight of authority on the subject supports Plaintiff's position. This Court has held that evidence of rig welders subjectively believing they were independent contractors and listing themselves as such on their tax forms to be "**of little, if any, relevance**." *See Baker v. Barnard Const. Co. Inc.*, 860 F.Supp. 766, 772-73 (D.N.M. 1994), *aff'd*, 137 F.3d 1436 (10th Cir. 1998). When balanced against the privacy considerations, not just form the public at large, but Defendants and their counsel in particular, the court should consider this holding instructive. The *Baker* correctly applied the employee definition under the FLSA when it held:

> **"[I]t is clear that the Plaintiffs treating themselves as independent contractors on their tax forms was a reaction to the Defendants non-negotiable policy."**

Id. Indeed, Defendant only in passing cites one case in support of its position with no discussion. Even that one unpublished opinion admits that "tax returns contain confidential information and should not be lightly disclosed." Mtn. at 4-5, (citing *Saenz v. Rod's Prod. Servs.*, Civ. No. 2:14-CV-00525-RB-GBW, at *2 (D.N.M. March 24, 2015)). However, Defendant leaves the Court to speculate as to the applicability that order and the present case. As noted above, case law from the Tenth Circuit makes abundantly clear that tax returns are not relevant to this dispute.

The focal point of the economic reality test to determine FLSA coverage is “whether the individual is economically dependent on the business to which he renders service,” rather than contractual terminology or formal labels. *See Baker v. Flint Eng’g & Const. Co.*, 137 F.3d 1436 (10th Cir. 1998). Because the Plaintiff’s status on his tax returns is an effect, rather than cause, of their classification as independent contractors, the discovery of such documents has zero bearing on the merits of the Plaintiff’s claim.

As a result, other courts in the Tenth Circuit have denounced the relevance of tax documents in FLSA misclassification cases. *Johnson v. Unified Government of Wyandotte,* No. Civ. A. 99-2407-JWL, 2001 WL 699049, at *3 (D. Kan. June 15, 2001) ("tax returns are not relevant to the issue of whether plaintiffs performing . . . work are 'employees' to whom the FLSA applies, or, rather, whether plaintiffs are 'independent contractors' not protected by the FLSA."). Even if tax returns were relevant in this case, the same information can be obtained through much less intrusive means. *See* Ex. A, *Lee v. DISH Network, LLC et al.*, Case No. 13-1219 KG/SY, Order re Defendant's Motion to Compel (D.N.M. Dec. 15, 2014) (Yarbrough, J.) (denying in part motion to compel and holding that defendant can acquire information sought through worker’s tax returns through interrogatories, depositions, and requests for admissions). Moreover, under New Mexico law, tax returns are strictly shielded from discovery. *Breen v. State Taxation and Revenue Dept.,* 287 P.3d 379, 388 (N.M. Ct. App. 2012) (discussing New Mexico Taxpayer Bill of Rights, N.M. Stat. § 7-1-4.2).

ARGUMENTS AND AUTHORITIES

I. Tax Returns are Not Relevant to Whether the Plaintiff was Misclassified Under the FLSA.

Discovery into Plaintiffs' tax returns conflates the effect of independent contractor misclassification with its cause. Because the FLSA does not permit employees to waive their employee status, courts assign little to no weight to the plaintiffs' mistaken belief that they are independent contractors or the plaintiffs' resultant tax filings. *See Baker v. Barnard Const. Co.*, 860 F.Supp. 766, 772-73 (D.N.M. 1994), *aff'd*, 137 F.3d 1436 (10th Cir. 1998). In fact, the very nature of independent contractor misclassification necessitates that misclassified employees file tax returns that are not reflective of their status as an employee under the FLSA. *Id.* ("Therefore, it is clear that the Plaintiffs treating themselves as independent contractors on their tax forms was a reaction to the Defendants non-negotiable policy."). In FLSA cases, courts have specifically held that the discovery of a plaintiff's tax returns is not warranted as this information is at best only minimally relevant and can be more readily obtained from a less intrusive source, namely the defendant's own records. *See, e.g., Melendez v. Primavera Meats, Inc.*, 270 F.R.D. 143, 144-45 (E.D.N.Y. 2010). To determine whether a worker is an employee or independent contractor, the Tenth Circuit applies a six factor 'economic reality' test:

> (1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; (5) the degree of skill required to perform the work; and (6) the extent to which the work is an integral part of the alleged employer's business.

Baker v. Flint Eng'g & Const. Co. Inc., 137 F.3d 1436, 1440 (10th Cir. 1998) (citing *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989)).

The Defendant twists the 'permanence of the working relationship' factor into an exhaustive inquiry into every source of income for the Plaintiff. However, Tenth Circuit courts typically compare the plaintiff's working relationship with the defendant to the industry standard, rather than the plaintiff's supplementary sources of income. *Id.* at 1442, 1444 (concluding that plaintiff rig welders were employees under the FLSA despite typically working for the defendant for two month stints). In *Baker,* the Court stated that the transient nature of the plaintiff's work was "due to the intrinsic nature of oil and gas pipeline construction work rather than any choice or decision on the part of plaintiffs." *Id.* at 1442.

In *Johnson,* the court addressed a nearly identical issue as that currently before this Court. *Johnson,* 2001 WL 699049 at *2. In resolving this issue, the *Johnson* Court stated as follows: **"the court does not find plaintiffs' tax returns relevant to any of the six factors."** *Id.* In *Johnson,* the plaintiffs brought a lawsuit under the FLSA. *Id.* The plaintiffs argued that they were misclassified as independent contractors when they were really employees under the FLSA — the exact same argument that the Plaintiffs have made in this case. *Id.* The defendant asserted that the plaintiffs' tax returns were relevant to demonstrate that the plaintiffs were independent contractors — the same argument made by Defendants in this case. *Id.* The *Johnson* Court rejected this argument and stated as follows:

> While the court recognizes that there is an argument to be made that the label which a worker gives him or herself on his or her tax returns could theoretically be viewed as relevant to a determination of whether the worker is an employee or an independent contractor, particularly if the focus were on form rather than substance, the court is convinced that the Tenth Circuit would reject such a position. Instead, the Tenth Circuit's recent opinions indicate that, because we are to be looking to determine the economic realities of the relationship, the factors relevant to this determination are limited to the six discussed in *Dole.* **Moreover, the Tenth Circuit's focus in *Baker* on whether or not the worker economically depends upon the alleged employer for the opportunity to render service and not on whether the worker can control costs (which would be reflected by deductions on tax returns) convinces the court that the Circuit would not consider tax treatment by a worker as an independent relevant factor in determining whether the worker is an employee or an independent contractor**.

Id. at *3 (emphasis added). This underscores a broader theme in the case law; namely, that substance over form is what matters when determining the employee status of a given workers.

The *Johnson* Court stated that the critical inquiry is whether the worker has the "ability to bid on projects…and to complete projects as it sees fit." *Id.* at *2. Tax returns are not relevant at all to this inquiry. *Id.*

The *Johnson* Court relied upon the *Baker v. Flint Eng'g & Const., Co.* opinion. In *Baker,* the Tenth Circuit espoused the economic realities test for determining employee status under the FLSA and rejected the Fifth Circuit's analysis in *Carrell v. Sunland Const., Inc.,* 998 F.2d 330 (5th Cir. 1993). *See Baker v. Flint Eng'g & Const., Co.,* 137 F.3d 1436, 1444 (10th Cir. 1998). The Tenth Circuit explained that it "disagree[s] with the finding in *Carrell* that [workers] have an opportunity to maximize their profits by controlling the costs of their supplies and by consistently finding work with other companies." *Id.* The Tenth Circuit continued:

> [T]his is not the type of "profit" typically associated with an independent contractor. Generally speaking, an independent contractor has the ability to make a profit or sustain a loss due to the ability to bid on projects at a flat rate and to complete projects as it sees fit. Here, plaintiffs have neither the ability to bid on projects nor to complete their work in an independent fashion.

Id. Fortunately for Plaintiffs, this case is pending in the 10th Circuit, not the Fifth and not the 6th Circuit to which Defendant's cited inapposite authority.

Defendant's argument in part rests on the legally fallacious positon that tax returns might reveal evidence showing the opportunity for profit and loss. Defendants misrepresent this economic reality factor. Again, this is not an issue of first impression. The *Baker* case is the most instructive. The *Baker* court addressed what types of investments were relevant to the determine whether they affected the opportunity for profit and loss, and they were not talking about hand tools or even depreciation on a truck used in part for work. On the contrary, the *Baker* court described this factor as follows:

> The investment "which must be considered as a factor is the amount of large capital expenditures, such as risk capital and capital investments, not negligible items, or labor itself." *Dole,* 875 F.2d at 810. This factor "is interrelated to the profit and loss consideration." *Secretary of Labor, U.S. Dept. of Labor v. Lauritzen,* 835 F.2d 1529, 1537 (1987). "Courts have generally held that the fact that a worker supplies his or her own tools or equipment does not preclude a finding of employee status." *Dole,* 875 F.2d at 810.

Baker, 137 F.3d 1436, 1442 (10th Cir. 1998). Indeed, not even the welding rigs, which cost $40,000, amounted to the type of "large capital expenditures" that would be relevant to the economic realities test. *Id*. at 1439 ("The equipped trucks are referred to as "welding rigs," and each welding rig costs between $35,000 and $40,000."). Given how narrowly circumscribed the opportunity for profit and loss is under 10th Circuit authority, the tax documents at issue here are not probative of anything. The example filed by Defendants illustrates this nicely.

Incidentally, it is not clear from what source Defendants obtained the private tax return of opt in plaintiff Steve Nicholson. Plaintiffs clearly did not produce such highly sensitive information in discovery. Defendants should be required to reveal how it obtained such information.

Based on this guidance, the Court should readily conclude that the Plaintiffs' tax returns are not relevant to the economic reality test. Tax returns do not indicate whether the Plaintiffs can bid on a project or complete a project as they see fit. These are critical inquiries and tax returns are simply not relevant. Just like the *Johnson* court stated, tax returns shed no light on the economic realities test. For the same reasons, Defendants' Motion to Compel all tax information (returns, 1099s, w-2s, etc.) should be denied.

Defendants' argument that any deductions in the tax returns of the Plaintiffs are relevant is without merit for other reasons as well. In short, tax status under the Internal Revenue Code has little to do with employee status under the FLSA. While one might be tempted to conflate the two, the remedial nature of the FLSA requires the court and the parties to strictly adhere to the broad definition of employee under the Act. The tax treatment of business expenses under the Internal Revenue Code has no bearing on the Plaintiffs' rights under the FLSA. Under the Internal Revenue Code, an employee can take deductions for various work related expenses such as mileage, home office, equipment, and supplies. *See, e.g.*, 26 C.F.R. § 1.62-2. The IRC treats these as normal expenses to be taken by an ***employee***. *Id.* The mere fact that an employee takes permissible deductions under the IRC does not convert the employee to an independent contractor under the FLSA. As such, Defendants' arguments that deductions that the Plaintiffs took under the tax code somehow demonstrate that the Plaintiffs are independent contractors is entirely unpersuasive and inconsistent with the law. Again, the tax returns are not relevant to the issues in this case.

Tax returns are irrelevant to each of the six factors under the economic realities test as explained in *Baker*. First, the control factor of the economic realities test focuses on the amount of control exerted by the alleged employer over the worker. *See Baker*, 137 F.3d at 1441. Evidence of control includes Defendants' disciplining the Plaintiffs, supervising the Plaintiffs, training the Plaintiffs, and similar actions. Tax returns do not shed light on the existence of these facts. Second, tax returns do not indicate any information regarding the "relative investment" factor. Within the meaning of the economic realities test, "investments" are "large capital expenditures, such as risk capital and capital investments, not negligible items, or labor itself." *Snell*, 875 F.2d at 810. Defendants have not asserted that the Plaintiffs made such investments or expenditures. Third, regarding the opportunity for profit and loss, Plaintiff has already addressed that point above. Fourth, tax returns in no way indicate the degree of skill required to perform the work. The degree of skill necessary to do the job is indicated by installation records and training records. Fifth, tax returns do not demonstrate the degree to which the Plaintiffs' work is integral to Defendants' business. Sixth, the tax returns do not show the permanency of the relationship between the Plaintiffs and Defendants. Tax returns indicate how much Defendants paid the Plaintiffs. On the other hand, they do not demonstrate dates of employment, periods for vacation, or how long the Plaintiffs worked for Defendants. That information, incidentally, is clearly established from the time sheets exchanged by the parties, meaning a less intrusive means is available to obtain the information.

The bottom line is that nothing in tax returns is relevant to this action to justify the invasion of privacy required for their production. Defendants' Motion to Compel should be denied.

II. In the Tenth Circuit, Tax Returns are Generally Not Discoverable

The Supreme Court has recognized that "pretrial discovery . . . has significant potential for abuse," including "implicat[ing] privacy interests of litigants and third parties." *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 34-35 (1984). This is particularly true with regards to tax returns, which courts have long recognized as confidential documents that contain highly sensitive information. *See, e.g., Natural Gas Pipeline Co. of America v. Energy Gathering, Inc.*, 2 F.3d 1397, 1411 (5th Cir. 1993) (tax returns are "highly sensitive documents," the routine disclosure of which courts should be "reluctant" to order during discovery); *see also DeMasi v. Weiss,* 669 F.2d 114, 119-20 (3rd Cir. 1982) (noting the existence of public policy against disclosure of tax returns): *Premium Serv. Corp. v. Sperry & Hutchinson Co.,* 511 F.2d 225, 229 (9th Cir. 1975) (same).

Courts are reluctant to order this discovery because of the "private nature of the sensitive information contained therein, and in part from the public interest in encouraging the filing by taxpayers of complete and accurate returns." *Chen v. Republic Restaurant Corp.,* No. Civ. A. 07-3307. 2008 WL 793686, at *2 (S.D.N.Y. Mar. 26, 2008). For this reason, "federal courts generally resist discovery of tax returns." *E.E.O.C. v. Ceridian Corp.,* 610 F. Supp. 2d 995, 996 (D. Minn. 2008). Indeed, [r]outine discovery of tax returns is not the rule but rather the exception." *Columbus Drywall & Indus., Inc. v. Masco Corp.,* No. Civ. A. 1:04-CV-3066-JEC, 2006 WI, 5157686. at *7 (N.D. Ga. 2006). The Tenth Circuit has remarked that "[t]ax returns are not generally discoverable." *Sanderson v. Winner,* 507 F.2d 477, 480 (10th Cir. 1974) (emphasis added).

Accordingly, a party seeking disclosure of tax returns must show some compelling need in addition to relevance because tax returns are inherently confidential, privileged, and public policy prevents their disclosure. *See, e.g., Pendlebury v. Starbucks Coffee Co.,* No. Civ. A. 04- 80521, 2005 WL 2105024, at *1-2 (S.D. Fla. Aug. 29, 2005); *Terwilliger v. York Intl Corp.,* 176 F.R.D. 214, 217 (W.D. Va. 1997) (same); *SEC v. Cymaticolor Corp.,* 106 F.R.D. 545, 547 (S.D.N.Y. 1985) (same); *Aliotti v. Vessel Senora,* 217 F.R.D. 496, 497-98 (N.D. Cal. 2003) (same); *Gattegno v. Pricewaterhousecoopers, LLP,* 205 F.R.D. 70, 71-73 (D. Conn. 2001) (same); *E. Auto Distribs. Inc. v. Peugeot Motors of America, Inc.,* 96 F.R.D. 147, 148-49 (E.D. Va. 1982) (same); *United States v. Bonanno Organized Crime Family of La Cosa Nostra,* 119 F.R.D. 625, 627 (E.D.N.Y. 1988) (same).

Thus, the test for disclosure of tax returns embraced by the majority of courts is as follows: [f]irst, the court must find the returns are relevant to the subject matter of the action. Second, the court must find that there is a compelling need for the returns because the information contained therein is not otherwise readily obtainable." *Hartford Fire & Ins. Co. v. P & H Cattle Co., Inc.,* No. Civ. A. 05-2001-DJW, 2009 WL 2951120, at *7 (D. Kan. Sept. 10, 2009). The burden is on the Defendants to demonstrate each element of the test above for the disclosure of tax returns. *Id; see also Uto v. Job Site Servs., Inc.,* 269 F.R.D. 209, 212 (E.D.N.Y. 2010) ("The modern trend places the burden on the party seeking the discovery to establish both prongs of this test.")

III. Even if Tax Returns are Relevant, Defendants Have Made no Showing That They Cannot Acquire the Same Information Through Less Intrusive Means.

Plaintiff has already demonstrated above how the tax returns are not relevant to the economic realities factors as described by the 10th Circuit. The second prong is a compelling need for the returns because the information contained therein is not otherwise readily obtainable through less intrusive means. *Hartford Fire & Ins. Co. v. P & H Cattle Co., Inc.,* No. Civ. A. 05-2001-DJW, 2009 WL 2951120, at *7 (D. Kan. Sept. 10, 2009). Here, Defendants have failed to present any evidence demonstrating that the same information cannot be obtained through other means. This falls woefully short of meeting their burden. In fact, courts have specifically denied requests for tax returns when defendants fail to present sufficient evidence of a compelling need. *See Melendez v. Primavera Meats, Inc.,* 270 F.R.D. 143 (E.D.N.Y. 2010); Exhibit A, *Lee v. DISH Network, LLC et al.,* Case No. 13-1219 KG/SY, Order re Defendant's Motion to Compel (D.N.M. Dec. 15, 2014) (Yarbrough, J).

In *Melendez,* the district court refused to allow the discovery of the workers' tax returns in an FLSA case. *Id.* at 145. The defendants in *Melendez* argued that the workers were independent contractors and not employees under the FLSA. *Id.* at 144. The defendants then sought to discover the plaintiffs' tax records to show that the plaintiffs worked for other employers. *Id.* at 145. After applying the two-pronged test, the court granted the plaintiffs' motion for a protective order and prevented the disclosure of the tax records. *Id.* The court noted that even if the records were relevant, the defendants failed to establish a compelling need for their production. *Id.* In particular, the *Melendez* Court noted that the amount the defendants paid the plaintiffs would be available from the defendants' own records and that interrogatories could be sent to the plaintiffs seeking the same information. *Id.*

The facts in this case are nearly identical to the facts in *Melendez.* Just like in *Melendez,* this case concerns a dispute under the FLSA over whether Plaintiffs were employees of Defendants or independent contractors. Moreover, as in *Melendez,* the amounts Defendants paid the Plaintiffs can be easily derived from the records in Defendants" possession. Furthermore, the information that Defendants seek from the tax returns can be obtained through much less intrusive means, including request for admissions and interrogatories. Therefore, just like in *Melendez,* Defendants' request for the tax returns should be denied.

Moreover, federal courts have identified several alternate methods to acquire the same information as that contained in tax returns that are less intrusive. First, information concerning how much the Plaintiffs earned while working for Defendants can easily be obtained by looking at the records in Defendants' possession. *See Garcia v. Benjamin Group Enterprises, Inc.,* No. Civ. A. 09-2671, 2010 WL 2076093 (E.D.N.Y. May 21, 2010). Second, the same information that Defendants seek from the tax returns can easily be obtained through interrogatories, depositions, and requests for admission. *See Pendlebury v. Starbucks Coffee Co.,* No. Civ. A. 04- 80521, 2005 WL 2105024, at *2 (S.D. Fla. Aug. 29, 2005) ("Plaintiffs correctly note, however, that [the same information in the tax returns] can be gleaned through interrogatories. Similarly, Defendant could inquire into these areas at depositions or through requests for admissions."); *see also Nesselrodte v. Diva's, LLC,* No. Civ. A. 3:11-95, 2012 WL 2061523, at *2 (N.D. W.Va. June 7, 2012) ("Here, the information sought is obtainable through less intrusive means, including through interrogatories, requests for admissions, and depositions."). Third, affidavits can be issued in lieu of tax returns. *See Galaviz-Zamora v. Brady Farms, Inc.,* 230 F.R.D. 499, 503 (W.D. Mich. 2005) ("each Plaintiff shall execute an affidavit identifying every employer for whom they were employed during the time period they claim to have worked for Defendants.")

Thus, there are several alternate methods to obtain the same information that are less intrusive. Defendants could easily acquire the same information through interrogatories and requests for admission, assuming a finding was made that such information is even relevant. Defendants can also inquire into the information they seek through depositions. Defendants have failed to present any evidence demonstrating that these other discovery means are insufficient. Accordingly, Defendants' Motion to Compel should be denied.

IV. Under New Mexico law, Tax Returns are Not Discoverable.

New Mexico law strictly protects litigants from the disclosure of tax information. In particular, under the New Mexico Taxpayer Bill of Rights, N.M. Stat. § 7-1-4.2, tax records are protected with utmost confidentiality. N.M. Stat. § 7-1-4.2. The Taxpayer Bill of Rights includes "the right to have the taxpayer's tax information kept confidential unless otherwise specified by law in accordance with Section 7-1-8." *Id.* at § 7-1-4.2(H). Section 7-1-8 states that is unlawful for any person other than the taxpayer to reveal to any other person the taxpayer's return or return information, except as provided in Section 7-1-8.1 through 7-1-8.10- *Id.* at § 7- 1-8.1(A). The exception for tax records in judicial proceedings are explained in 7-1-8.4. None of these exceptions are implicated here.

First, this is not an action relating to tax fraud or an action relating to unpaid taxes. Second, this is not an action attempting to collect a tax. Third, this is not an action involving the New Mexico Department of Revenue as a party.

As one New Mexico court noted, the disclosure exceptions embodied in section 7-1- 8.4(A) are limited to cases involving "the assessment, collection, and enforcement of tax laws [which are] the essence of tax administration, thus, creating an exception for disclosure during judicial proceedings when the taxpayer is a party, and tax administration is the gist of the case." *Breen v.*

State Taxation and Revenue Dept., 287 P.3d 379, 388 (N.M. Ct. App. 2012). If fact, in analyzing the extent of the confidentiality of tax records, the *Breen* court favorably cited the California Supreme Court opinion of *Webb v. Standard Oil Co. of Cal.,* 319 P.2d 621, 624 (Cal. 1958) for the proposition that tax returns are protected from disclosure:

> If the tax information can be secured by forcing the taxpayer to produce a copy of his return, the primary legislative purpose of the secrecy provisions will be defeated. **The effect of the statutory prohibition is to render the returns privileged, and the privilege should not be nullified by permitting third parties to obtain the information by adopting the indirect procedure of demanding the tax returns.**

Breen, 287 P.3d at 387 (emphasis added). The *Breen* court continued, "the public policy is strict and mostly universal in giving taxpayers protection through confidentiality of these records." *Id.* (citing *People v. Gutierrez*, 222 P.3d 925, 933 (Colo. 2009) ("[E]very other state in the country (including the District of Columbia) has adopted an analogous statutory regime, evincing a national consensus that taxpayers' tax returns are considered confidential, private communications with the [D]epartment of [R]evenue and should be made available for non-tax purposes only in the rarest of circumstances.").

The confidential protection afforded to tax returns should be extended to this case and the Plaintiffs should not be required to produce this private information. Simply put, tax returns are privileged and Defendants do not have right to this information.

V. Business Documents Related to Third Parties Are Not Discoverable because they do not bear on the issues of the relationship with the putative employers in this case.

The Tenth Circuit has a public policy against the exposure of tax returns and related financial documents. *Sanderson v. Winner*, 507 F.2d 477 (10th Cir. 1974). Even if this Court finds the Plaintiff’s tax returns discoverable, the discovery of Plaintiff’s 1099 and W-2 forms sent and received to third parties, business documents related to third parties, and any invoices, bills, and reimbursements to third parties oversteps the boundaries of matters relevant to this dispute. Defendant states that such documents are relevant to the type of work the Plaintiff performed for third parties while working for other businesses. However, the inquiry of the economic reality test focuses on the economic reality of the ***Plaintiff's working relationship with the Defendant, rather than with other employers***. *Baker et al., v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998).

Additionally, an inquiry into the Plaintiff's duration of employment with Defendant does not justify an overly broad and unduly burdensome discovery into every business dealing he entered with a third party. The Defendant has failed to cite a single case where the Court's inquiry extended beyond the scope of the economic reality of the Plaintiff's relationship with the Defendant and into the Plaintiff's other business dealings. Rather, the Tenth Circuit has instead compared the economic reality of the individual's working relationship with the employer to industry standards generally. *See id.* at 1442 ("Therefore, while rig welders are temporary workers, **this finding is of little relevance** in determining whether these Plaintiffs are employees or independent contractors.")(emphasis added). Any alleged gaps in Plaintiff's employment with Defendant is easily discoverable through less burdensome and intrusive sources. FED. R. CIV. P. 26(b)(2)(C)(i). The time periods during which the Plaintiff worked for the Defendant is most easily discovered by examining employment records in the Defendant's possession. This is especially true in the context of an FLSA claim, where the employer has a burden to retain employee records. Inquiring into Plaintiff's tax returns and communications with third parties is not relevant to the permanence of Plaintiff's working relationship with Defendant, and even if it was, such information is more easily obtained through the business documents the Defendant is legally obligated to retain under the FLSA.

For example, Defendants seek invoices to flow back companies other than Defendants. Such invoices are irrelevant in the same way that a person who works with McDonald's once month and Burger King the next is no less an employee of both. Defendant already has the dates of employment with the Defendants. At most, the invoices submitted to other flow back companies between the first and last date of employment with defendants during the statutory period is discoverable. What Plaintiffs did before and after the start and end dates is not probative of any factor in the economic realities test.

As for communication between some plaintiff and their family members (such as Mr. Walker and his family), the request are far overbroad on their face and would include private communication between family member that has nothing to do with this case. The requests have no reasonable limit in time or subject matter.

Even if evidence of a plaintiff subcontracting work to another flow tester might be relevant in some respect, the tax documents Defendant seeks are not the least restrictive means of obtaining such information. Hence the motion on this point should also be denied.

Requesting all credit card, bank statements and loan documents over five years (Requests Nos. 18 and 19) is likewise a fishing expedition that will result in the production of irrelevant and private information. There is little if any probative value to producing such information. This request is pure harassment and is intended to discourage opt in plaintiffs from continuing with the lawsuit less they be subjected to an exhaustive review of their purchases over four to five years.

The same holds true for requests 20 seeking formation of "every business" plaintiff has owed regardless if related to the industry in question. Defendant did not even attempt to limit this request. Request 22 seeks "documents" related to vehicles for 5 years. The registration and title are not probative of any issue in this case. Lastly request 23 seeks job postings and the like with no limit in time. As with its other requests, Defendants cite absolutely zero authority supporting their positon that any court has ever considered such evidence probative of the factors in the economic reality test. As such, Defendant's motion should be denied.

CONCLUSION

For the reasons explained above, Defendants' Motions to Compel should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 31, 2017, I filed this document through the District of New Mexico's CM/ECF system which will serve a copy on all parties of record.

/s/ Galvin B. Kennedy
Galvin B. Kennedy